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Recommended Citation

Rebecca Stang, *I Get by with a Little Help from My "Friends": How the National Labor Relations Board Misunderstands Social Media*, 62 DePaul L. Rev. 621 (2013)
Available at: <https://via.library.depaul.edu/law-review/vol62/iss2/17>

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I GET BY WITH A LITTLE HELP FROM MY “FRIENDS”: HOW THE NATIONAL LABOR RELATIONS BOARD MISUNDERSTANDS SOCIAL MEDIA

“Oh, you hate your job? Oh my god, well why didn’t you say so?
You know there’s a support group for that. It’s called EVERY-
BODY. They meet at the bar!”¹

INTRODUCTION

For many Americans, complaining about a job is one of the perks of having one. With the emergence of social media, employees have even more channels through which to communicate their work-related grievances. Consider this ordinary situation: a bartender is annoyed about his employer’s tipping policy, which does not require waitresses to share their tips with bartenders.² The bartender complains to his fellow bartender about the policy, and she agrees that it “suck[s].”³ From the comfort of his home, the bartender has a conversation on his Facebook wall with a relative.⁴ He complains about the unfairness of the employer’s tipping policy and mentions that he has not had a raise in five years.⁵ None of his coworkers comment on the conversation.⁶ His employer finds out about the post and, despite five years of loyal employment, fires the bartender due to the Facebook post.⁷

The bartender is one of many employees who have been fired because of social media conduct.⁸ As social media use continues to

1. *Memorable Quotes from “The Drew Carey Show” (1995)*, IMDB, <http://www.imdb.com/title/tt0111945/quotes> (last visited Jan. 13, 2013).

2. LAFE E. SOLOMON, NAT’L LABOR RELATIONS BD., REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 14 (Aug. 2011) [hereinafter NLRB AUGUST REPORT], available at <http://www.nlr.gov/news/acting-general-counsel-releases-report-social-media-cases>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.*

8. A 2009 study showed that 8% of U.S. companies with 1,000 or more employees have fired workers for their conduct on social media sites. Adam Ostrow, *FACEBOOK FIRED: 8% of US Companies Have Sacked Social Media Miscreants*, MASHABLE (Aug. 10, 2009), <http://mashable.com/2009/08/10/social-media-misuse>.

grow,⁹ the line between the private and public spheres of employment becomes increasingly hazy.¹⁰ In a world in which many social media users share their every thought on Facebook¹¹ and Twitter,¹² how can employers protect themselves from employee criticism without infringing on their employees' rights?¹³ Section 7 of the National Labor Relations Act (the NLRA) gives employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or mutual aid or protection."¹⁴ Congress enacted the NLRA in 1935, decades before the Internet was conceived.¹⁵ Because the NLRA was written before social media sites existed, it is unclear how its language applies when a conversation about work moves from the water cooler to a Twitter feed.¹⁶ When protections laid out by the NLRA are applied to social media, the distinction between "concerted" and "non-concerted" activity becomes more confusing.

In an attempt to clarify the situation, the General Counsel of the National Labor Relations Board (the NLRB), which protects the rights promulgated by the NLRA, released three reports from August

9. In 2010, the number of Facebook users increased from 337 million to 585 million, which amounted to a 74% increase. *Facebook 2010 Growth Stats: Infographic*, DIGITAL BUZZ BLOG (Feb. 14, 2011), <http://www.digitalbuzzblog.com/facebook-2010-growth-stats-infographic>.

10. See Erin L. Gouckenour, *Social Networking and the Workforce: Blurring the Line Between Public and Private Spheres*, VA. B. ASS'N NEWS J., Winter 2009/2010, at 8, 8 ("To many, social networking pages feel personal and private. The very nature of social networking pages, however, makes them public. Even those individuals who protect their privacy on Facebook likely connect with others they know little or nothing about. Such users cannot say for certain who sees their information. Because of this uncertainty associated with many social networking circles, posting information and opinions that may be viewed as polarizing or offensive can lead to unexpected penalties.").

11. Alexei Oreskovic, *Google+ to Facebook: TMI!*, REUTERS (Oct. 20, 2011, 1:38 AM), <http://blogs.reuters.com/mediafile/2011/10/20/google-to-facebook-tmi> ("Facebook [is] increasingly pushing the boundaries on the amount of personal information that people share online . . .").

12. Twitter users post short messages, also called "tweets," of 140 characters or fewer. Twitter users can request to follow other users; if their request is accepted, they will be able to see the other users' messages in their newsfeeds. Instead of "friending" someone, as on Facebook, Twitter users invite people to "follow them" on Twitter. See *How to Post a Tweet*, TWITTER, <https://support.twitter.com/articles/15367-how-to-post-a-tweet> (last visited Jan. 13, 2013).

13. Christopher E. Parker, *The Rising Tide of Social Media*, FED. LAW., May 2011, at 14, 16 ("Employers have to balance their own needs to protect their assets against the legal rights of their employees.").

14. 29 U.S.C. § 157 (2006).

15. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69) (2006).

16. Lafe E. Solomon, the NLRB's Acting General Counsel who released the reports said: "Our position is if there's evidence of group action or inducing action about the terms and conditions of employment, employees should feel just as protected online as if they said something at the water cooler." See Cindy Krischer Goodman, *Online Rants—What's Protected?*, MIAMI HERALD, Sept. 28, 2011, at 8B, available at <http://miamiherald.typepad.com/worklifebalancingact/2011/09/online-job-complaints-can-you-get-fired.html>.

2011 to May 2012 illustrating numerous cases of social-media-related employee terminations.¹⁷ The first report (the August Report) describes the NLRB's perspective on what constitutes a concerted activity in the context of social media.¹⁸ The second (the January Report) and third (the May Report) reports examine the lawfulness of many different social media policies.¹⁹ To determine whether the social media communication in question was protected, concerted activity, the General Counsel examined a multitude of factors, including, but not limited to: (1) whether other employees commented on or "liked" the posting; (2) whether the employee intended to induce group activity; (3) whether the posting was a logical outgrowth of earlier concerted activity; and (4) the substance of the posting.²⁰ While in some cases the NLRB justified its decision to protect an employee's social media communication by reasoning that the purpose of the communication was to initiate group action, in other cases it seemed unconcerned with the specific goal of the employee's posting, resulting in an unwieldy totality-of-the-circumstances test. This test neither adequately protects employees' legitimate activities nor provides clear guidance on how to classify concerted activities on social media sites.

Administrative law judges have begun to adjudicate the cases contained in the Reports without examining the differences between social media and real-life conversations.²¹ The NLRB seems to be stretching the rules outlined by NLRB cases that were decided before social media became an issue²² in an effort to protect social media activities. This trend in the Reports has implicitly created of an inco-

17. As Mr. Solomon, not the NLRB, prepared these Reports, the decisions discussed in this Comment (with the exception of two NLRB-issued decisions) are not dispositive—however, in the two formal NLRB decisions on social media discussed in this Comment, the NLRB affirmed the administrative law judges' decisions using reasoning similar to Solomon's. See *Hispanics United of Buffalo, Inc.*, No. 03-CA-027872 (N.L.R.B. Dec. 14, 2012); *Karl Knauz Motors, Inc.*, No. 13-CA-046452, at 10 (N.L.R.B. Sept. 28, 2012).

18. See NLRB AUGUST REPORT, *supra* note 2, at 2.

19. See LAFE E. SOLOMON, NAT'L LABOR RELATIONS BD., REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 2 (Jan. 4, 2012) [hereinafter NLRB JANUARY REPORT], available at <http://www.nlr.gov/news/acting-general-counsel-issues-second-social-media-report> (follow "Operations Management Memo" hyperlink); LAFE E. SOLOMON, NAT'L LABOR RELATIONS BD., REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 2 (May 30, 2012) [hereinafter NLRB MAY REPORT], available at <http://www.nlr.gov/news/acting-general-counsel-releases-report-employer-social-media-policies> (follow "Operations Management Memo" hyperlink).

20. See NLRB AUGUST REPORT, *supra* note 2; NLRB JANUARY REPORT, *supra* note 19; NLRB MAY REPORT, *supra* note 19.

21. See, e.g., *Karl Knauz Motors, Inc.*, No. 13-CA-046452 (N.L.R.B. Sept. 28, 2012); *Three D LLC*, No. 34-CA-12915 (N.L.R.B. Jan. 13, 2012); *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 8 (N.L.R.B. Sept. 2, 2011).

22. Cf. *Meyers Industries, Inc.*, 281 N.L.R.B. 882, 882 (1986).

herent totality-of-the-circumstances test for concerted activity in the context of social media.

To further its goal of protecting legitimate concerted activities under the NLRA, the NLRB must adopt a more consistent standard for evaluating the substance of social media communications, of which the least compelling factor should be whether the employees' coworkers actually commented on the post. Instead, the NLRB should first ask whether the employee's coworkers could access the employee's post. Once evidence has been presented that the employee's coworkers could view the post, the NLRB should move on to a two-factor test to determine whether the social media communication qualifies as concerted activity, which includes: (1) whether the employee intended to initiate discussion with coworkers; and (2) whether the substance of the post implicated a global employment concern. Unlike the current totality-of-the-circumstances test, in which no factor is decisive, the new standard will give more weight to the substance of the post in determining whether the social media communication qualifies as concerted activity.

The Reports' heavy focus on the presence of other employees' comments is misplaced because the NLRB has not accounted for the differences between social media communications and real-life conversations. Therefore, Part II of this Comment begins by discussing some of the reasons people use social media.²³ It then explains that only 10% of social media users contribute content while using social networking sites, which leaves an overwhelming majority of social media users who passively read content and observe activity—also known as the “lurking” phenomenon.²⁴ Part II also describes the reasons for which employees may be fired for their conduct on social media sites.²⁵ Finally, Part II discusses the NLRB's memoranda in detail, including an in-depth look at some of the most significant cases, as well as two formal decisions issued by the NLRB.²⁶

Part III explains that the NLRB's standard provides broad protection of concerted activity.²⁷ Nevertheless, Part III argues that even this broad standard does not adequately protect employees' concerted activities on social media sites because it is both overinclusive and underinclusive. Part III further argues that the Reports muddle the dis-

23. See *infra* notes 37–62 and accompanying text.

24. See PAUL CHANEY, *THE DIGITAL HANDSHAKE: SEVEN PROVEN STRATEGIES TO GROW YOUR BUSINESS USING SOCIAL MEDIA* 48 (2009).

25. See *infra* notes 63–69 and accompanying text.

26. See *infra* notes 70–130 and accompanying text.

27. See *infra* notes 134–42 and accompanying text.

tion between individual gripes and concerted activity. This distinction should constitute the focus of the NLRB's analysis in order to provide employers with clear guidance in the context of employee social media use.²⁸ Part III also describes how the "lurking" phenomenon applies to the concept of concerted activity.²⁹ Lastly, Part III concludes that the NLRB must update its standard to reflect a more complete understanding of the nature of social media communications to provide adequate protection of employees' social media communications, as well as provide a clearer standard to determine what constitutes concerted activity on social media outlets.

Part IV explains how the standard advocated for in this Comment will help further the NLRB's goal of protecting employees' legitimate concerted activities on social media sites. It also argues that the standard advocated for in this Comment will allow employers to protect themselves from slander and harassment without infringing on their employees' rights.³⁰

II. BACKGROUND

"If Facebook were a country it would be the third largest, behind only China and India."³¹

The NLRB wrote its Reports to clarify what is and is not considered concerted activity in the context of employee social media use, as well as to provide guidance on lawful social media policies for employers.³² According to the January Report, "[Social media] issues and their treatment by the NLRB continue to be a 'hot topic' among practitioners, human resource professionals, the media, and the public."³³ However, as social media use varies from user to user, the NLRB Reports do not acknowledge that users may observe and contemplate social media postings without contributing content.³⁴ This Part describes how social media sites are used and introduces the phenomenon of "lurking" to explain that most social media users do not contribute content.³⁵ Lastly, this Part explains how the NLRB defines concerted activity, as well as the kinds of social media communica-

28. See *infra* notes 175–88 and accompanying text.

29. See *infra* notes 171–73 and accompanying text.

30. See *infra* notes 190–98 and accompanying text.

31. Lev Grossman, *2010 Person of the Year Mark Zuckerberg*, TIME, Dec. 27, 2010–Jan. 3, 2011, at 44, 50, available at http://www.time.com/time/specials/packages/article/0,28804,2036683_2037183_2037185,00.html.

32. See, e.g., NLRB AUGUST REPORT, *supra* note 2, at 2.

33. NLRB JANUARY REPORT, *supra* note 19, at 2.

34. See *infra* notes 49–62 and accompanying text.

35. See *infra* notes 37–62 and accompanying text.

tions that the NLRB believes should be protected, as illustrated by cases examined in the Reports and the formal NLRB decisions.³⁶

A. *Social Media Use*

Human beings are social animals by nature.³⁷ In modern society, social media is one of the primary means by which people interact with one another.³⁸ Social networking sites are inherently social—their purpose is to facilitate engagement between friends.³⁹ People post on Facebook to engage with other people, not to talk to themselves.⁴⁰ While there are many reasons that people use Facebook,⁴¹ a study commissioned by the *New York Times* found altruism to be one of the top five reasons people share.⁴² “We share to bring valuable and entertaining content to others. We think about what our friends want to know, and try to help them out.”⁴³

Social media has completely changed the way people communicate.⁴⁴ It has allowed people to be more open, share their thoughts, and communicate with friends with whom they might not regularly interact in person. As Mark Zuckerberg, the founder of Facebook, said: “People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people That social norm is just something that has evolved over

36. See *infra* notes 75–130 and accompanying text.

37. See DAVID G. MYERS, *EXPLORING PSYCHOLOGY* 369–70 (8th ed. 2011) (“Social bonds boosted our ancestor’s survival rate We are innately social creatures. People in every society on Earth belong to groups . . .”).

38. See Farhad Manjoo, *You Have No Friends. Everyone Else Is on Facebook. Why Aren’t You?*, SLATE (Jan. 14, 2009, 4:56 PM), http://www.slate.com/articles/technology/technology/2009/01/you_have_no_friends.html (“[Facebook] has crossed a threshold—it is now so widely trafficked that it’s fast becoming a routine aid to social interaction, like e-mail and antiperspirant.”).

39. See Ramona Emerson, *New Study Probes How We Use Social Media*, HUFFINGTON POST (Sept. 28, 2011, 3:52 PM), http://www.huffingtonpost.com/2011/09/28/social-media-study_n_985102.html.

40. Marcia Pledger, *Social Media Blur Line of What Employees Can, Can’t Say*, PLAIN DEALER, Sept. 16, 2011, at A1, available at http://www.cleveland.com/business/index.ssf/2011/09/national_labor_relations_board.html.

41. CNN listed the twelve “most annoying” types of Facebook users, including the self-promoter, the town crier, the crank, and the chronic inviter. Brandon Griggs, *The 12 Most Annoying Types of Facebookers*, CNN TECH (Aug. 20, 2009), http://articles.cnn.com/2009-08-20/tech/annoying.facebook.updaters_1_facebook-users-friend-online-social-networks?s=PM:TECH. There are many types of Facebook and social media users, but most everyone who uses social media does so to engage in social activity. See *id.*

42. See Jeff Sonderman, *5 Reasons People Share News & How You Can Get Them to Share Yours*, POYNTNER (July 19, 2011, 10:19 AM), <http://www.poynter.org/latest-news/media-lab/social-media/139716/5-reasons-people-share-news-how-you-can-get-them-to-share-yours>.

43. *Id.*

44. Connie Davis Powell, “*You Already Have Zero Privacy. Get over It!*” *Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 146 (2011).

time."⁴⁵ Zuckerberg's statement is supported by statistics that show the amount of information people share on Facebook and other social media sites doubles each year.⁴⁶

Facebook encourages this sharing of information by prompting users to constantly enter status updates with the query: "What's on your mind?" When a user posts a status, such as "my boss made me cry this afternoon," the status appears on their friends' news feeds. Users can "like" their friends' statuses (by clicking on the "like" button, a thumbs-up appears next to the status) or comment on them.⁴⁷ The information that users contribute to Facebook and Twitter is information they actively decide to share: "You experience a huge number of things every day, but you choose to tell your friends about only a fraction of them"⁴⁸ Therefore, when social media users communicate on Facebook and Twitter, their comments are more than off-handed remarks that they might make casually in an in-person conversation; instead, their postings relay information that users deem important enough to actively share with their social media community. Thus, it is reasonable to conclude that people who post on social media sites seek a response from their Twitter followers or Facebook friends; otherwise, they would keep their thoughts to themselves.

As of November 2012, Facebook boasted a roster of more than one billion active users, more than 50% of who log in to Facebook daily.⁴⁹ However, not all of the one billion Facebook users contribute to the social media community in an equitable manner. In the social media world, there are two types of users: those who lurk and those who contribute content.⁵⁰ The lurkers "passively observe discussion," but

45. See Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN (Jan. 10, 2010, 8:58 PM), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy> (internal quotation marks omitted).

46. In fact, at Facebook they refer to this phenomenon as "Zuckerberg's law." See *Facebook: Sharing it All*, ECONOMIST (Sept. 23, 2011, 2:47 PM), <http://www.economist.com/blogs/babbage/2011/09/facebook>.

47. For more information on how to post and share content, see *How to Post and Share*, FACEBOOK, <http://www.facebook.com/help/sharing> (last visited Jan. 13, 2013).

48. Farhad Manjoo, *Not Sharing is Caring: Facebook's Terrible Plan to Get Us to Share Everything We Do Online*, SLATE (Sept. 22, 2011, 6:34 PM), http://www.slate.com/articles/technology/technology/2011/09/not_sharing_is_caring.html.

49. See Barbara Ortutay, *Facebook Tops 1 Billion Users*, USA TODAY (Oct. 4, 2012, 4:44 PM), <http://www.usatoday.com/story/tech/2012/10/04/facebook-tops-1-billion-users/161261>; *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaID=22> (last visited Jan. 13, 2013). As of September 2011, Twitter had 100 million active users. See *One Hundred Million Voices*, TWITTER BLOG (Sept. 8, 2011, 9:32 AM), <http://blog.twitter.com/2011/09/one-hundred-million-voices.html>.

50. See Mark Suster, *90% of User-Generated Content Site Visitors Are Lurkers, and It's OK*, BUS. INSIDER (Aug. 25, 2010, 10:37 AM), <http://www.businessinsider.com/90-percent-of-user-gen-site-visitors-are-lurkers-and-its-ok-2010-8>.

do not contribute content.⁵¹ According to Facebook, 90% of social media users lurk, 9% comment on content, and a lonely 1% create content.⁵² Thus, the vast majority of the nearly 500 million daily users are simply lurking on other users' profiles; they read and absorb content posted by others, but do not add to the content.⁵³

Although lurkers do not contribute to the conversations, they "benefit by overhearing the conversations of others."⁵⁴ The reasons for lurking are myriad, but for the purposes of this Comment one reason is of note: some social media participants do not want to speak out on a public platform.⁵⁵ Some employees may prefer to keep their opinions about their employers to themselves, but would still be interested to see what their coworkers are saying. This phenomenon demonstrates that employees are likely reading each other's statuses and posts without necessarily providing any physical evidence that they were part of the conversation.⁵⁶ Sometimes, the "more-informed" employees are the ones posting content, while "the less-informed can become better educated about matters over time."⁵⁷ Less-informed employees can learn from coworkers who post more actively and gain insight from what they read without otherwise participating.⁵⁸

Facebook's new format makes it even easier for people to lurk. Facebook's Ticker, launched in late September of 2011, allows users to

51. Benjamin G. Davis & Keefe Snyder, *Online Influence Spaces(s) and Digital Influence Waves: In Honor of Charly*, 25 OHIO ST. J. ON DISP. RESOL. 201, 224 (2010).

52. *21 Reasons People Don't Contribute on Social Media*, FACEBOOK (Dec. 2, 2010, 8:14 AM), http://www.facebook.com/note.php?note_id=467547860799. The 90% of lurkers is the "great silent majority." *Id.* They visit social media sites to read or view what others have created and commented on. See CHANEY, *supra* note 24, at 48.

53. Janna Crabb, *Social Media Lurkers—Who Are They and How Can You Engage Them?*, CASE (Mar. 10, 2011), http://case.typepad.com/case_social_media/2011/03/social-media-lurkers.html.

54. DEREK L. HANSEN ET AL., *ANALYZING SOCIAL MEDIA NETWORKS WITH NODEXL: INSIGHTS FROM A CONNECTED WORLD* 129 (2011).

55. See Crabb, *supra* note 53.

56. Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 457 (2011) ("[L]urkers do not leave visible traces . . ." (internal quotation marks omitted)).

57. Bradley M. Bakker, *Blogs as Constitutional Dialogue: Rekindling the Dialogic Promise?*, 63 N.Y.U. ANN. SURV. AM. L. 215, 261 (2007).

58. See Farina et al., *supra* note 56, at 458 ("'[J]ust' reading may represent a form of engagement that increases social capital, independent of whether reading leads to commenting."); see also TONY BINGHAM & MARCIA CONNER, *THE NEW SOCIAL LEARNING: A GUIDE TO TRANSFORMING ORGANIZATIONS THROUGH SOCIAL MEDIA* 51 (2010) ("The silent majority who rarely make the time to post can still gain tremendous value They can learn from those participating more actively.").

see all comments made by their Facebook friends.⁵⁹ The Ticker shows much more activity than would have shown up on users' newsfeeds previously.⁶⁰ The Ticker enables lurkers to passively observe their Facebook friends' activity. Lurking is even easier on Twitter; you do not need to have an active account to read other users' comments and posts.⁶¹ Nonetheless, 40% of Twitter users with active accounts log in regularly to Twitter to read messages, but do not post anything.⁶²

B. Off-Duty Social Media Activity

As a result of the pervasiveness of social media in society, employers must be explicit in their policies about limitations on work-related discussions on social media sites.⁶³ In the workplace, it is easy for employers to set strict rules regarding social media use.⁶⁴ However, controlling social media use outside of the office is much more difficult.⁶⁵ It is one thing to tell employees they cannot use Facebook on company time, but how can employers tell their employees that they are not allowed to use Facebook to discuss work with their friends in the comfort of their own homes? Many employees believe that what

59. Facebook's Ticker displays a constant stream of activity from friends' pages, including their new friends, whose walls they are posting on, and what statuses they like. See *Ticker*, FACEBOOK, www.facebook.com/help/ticker (last visited Jan. 13, 2013).

60. See Paul Boutin, *CATCHING UP ON ALL THE NEW FACEBOOK FEATURES*, N.Y. TIMES (Oct. 13, 2011, 4:36 PM), <http://gadgetwise.blogs.nytimes.com/2011/10/13/catching-up-on-all-the-new-facebook-features> ("On the right side of Facebook's Web interface, you can't miss the live-scrolling list of status updates from your friends."); Ned Potter, *Facebook Changes Look—and Everyone Hates New Ticker*, ABC NEWS (Sept. 21, 2011, 10:48 AM), <http://abcnews.go.com/blogs/technology/2011/09/facebook-changes-look-and-everyone-hates-new-ticker> ("Starting today, it will be easier to keep up with the people in your life no matter how frequently or infrequently you're on Facebook." (quoting Mark Tonkelowitz, an engineering manager at Facebook)).

61. *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016-about-public-and-protected-accounts> (last visited Jan. 13, 2013). However, Twitter has privacy settings; if the settings are enabled, no one can follow a user without his permission. *Id.* Facebook also has privacy settings; by placing people in different groups, users can choose to keep their entire profile private, or to only allow certain people to see their statuses or wall postings. See *Choose Who You Share With*, FACEBOOK, <http://facebook.com/help/privacy/sharing-choices> (last visited Jan. 13, 2013).

62. Bianca Bosker, *Twitter Finally Shares Key Stats: 40 Percent of Active Users Are Lurkers*, HUFFINGTON POST (Sept. 8, 2011, 2:51 PM), http://www.huffingtonpost.com/2011/09/08/twitter-stats_n_954121.html.

63. See Laura Thalacker & Kelly Kichline, *Pitfall Potential: The Risks of Social Media*, NEV. LAW., Sept. 2010, at 16, 24.

64. See Ethan Zelizer, *Ten Rules for a Social Media Policy: Embracing and Controlling Social Media in the Workplace*, CBA REC., Oct. 2010, at 52, 54 ("According to a survey of 1,400 chief information officers from U.S. companies with 100 or more employees, 54% of businesses have completely prohibited social networking sites in the workplace.").

65. See Stephen P. Rosenberg, *Facing up to Facebook: Social Networking Sites and the Workplace*, CONN. LAW., Apr. 2009, at 16, 18.

they do in their homes is their own business.⁶⁶ This belief is mistaken. The termination of employees over social media communications, whether originating in the workplace or their home, has become so common that a new term has emerged for it—doocing.⁶⁷ The ability of employers to fire employees is facilitated by the presumption of at-will employment.⁶⁸ Unless there is an agreement to the contrary, an employer can terminate an employee at any time for any reason with only a few exceptions.⁶⁹ Therefore, absent other protections, employers can fire their employees at will if they do not like what their employees post on Facebook and Twitter.

C. *The National Labor Relations Board's Protection of Concerted Activity*

To determine whether employees may be terminated for social media activities, it is logical to begin with the language of the NLRA. Section 7 of the NLRA reads as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment⁷⁰

Section 8 of the Act continues: “It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157”⁷¹ The key protection created by the NLRA consists of employees’ right to engage in “concerted activities,” and the NLRB is charged with protecting that right.⁷² On August 18, 2011, the NLRB released the August

66. See Thalacker & Kichline, *supra* note 63, at 16.

67. Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 647 (2011).

68. See Scott R. Grubman, Note, *Think Twice Before You Type: Blogging Your Way to Unemployment*, 42 GA. L. REV. 615, 626 (2008). Forty-nine states have a presumption of at-will employment. *Id.* at 625 & n.49 (“Montana is the only state that has not officially adopted the at-will employment doctrine.”).

69. See *id.* at 625–27.

70. 29 U.S.C. § 157 (2006).

71. *Id.* § 158(a)(1).

72. “The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees’ rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.” *What We Do*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/what-we-do> (last visited Jan. 13, 2013).

Report, which described the outcome of its investigations in fourteen cases.⁷³ Two additional reports from the General Counsel followed the August Report; in turn, administrative law judges have reviewed some of the cases described in the Reports, but the NLRB has reviewed only three of those decisions to date.⁷⁴ The General Counsel of the NLRB, Lafe E. Solomon, wrote the August Report to give insight into how the NLRB investigates social media firings and the lawfulness of social media policies.⁷⁵ In the August Report, Mr. Solomon explained that in cases adjudicated before the advent of social media, the NLRB had concluded that "an activity is concerted when an employee acts 'with or on the authority of other employees, and not solely by and on behalf of the employee himself.'"⁷⁶ Mr. Solomon noted that "[c]oncerted activity also includes 'circumstances where individual employees seek to initiate or to induce or to prepare for group action' and where individual employees bring 'truly group complaints' to management's attention."⁷⁷ The NLRB reiterated that "[e]mployees have a protected right to discuss wages and other terms and conditions of employment."⁷⁸

The NLRB uses these various criteria to examine concerted activity in the context of social media.⁷⁹ In the cases discussed in the Reports, Lafe E. Solomon applied a multitude of factors to determine whether a social media posting qualified as concerted activity, including, but not limited to the following: (1) whether other employees commented or "liked" the posting; (2) whether the employee intended to induce group activity; (3) whether the posting grew out of earlier concerted activity with other employees; and (4) the substance of the posting.⁸⁰ While these factors can be analyzed separately, the General Counsel often conflates the factors.⁸¹ For example, whether employees in-

73. See NLRB AUGUST REPORT, *supra* note 2.

74. The NLRB affirmed the administrative law judges' decisions in *Hispanics* and *Karl Knauz* in 2012. *Hispanics United of Buffalo, Inc.*, No. 03-CA-027872 (N.L.R.B. Dec. 14, 2012); *Karl Knauz Motors, Inc.*, Case No. 13-CA-046452, at 10 (N.L.R.B. Sept. 28, 2012). The NLRB recently adjudicated another case, but that case did not address the standard for concerted activity discussed in this Comment. *Costco Wholesale Corporation*, No. 34-CA-01241 (N.L.R.B. Sept. 7, 2012). Finally, an administrative law judge adjudicated another social media decision in January 2012, but the NLRB has not reviewed the decision. *Three D, LLC*, No. 34-CA-12915 (N.L.R.B. Jan. 13, 2012).

75. NLRB AUGUST REPORT, *supra* note 2, at 2.

76. See *id.* at 4.

77. *Id.* at 10 (citing *Meyers Industries, Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986)).

78. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 8 (N.L.R.B. Sept. 2, 2011).

79. See NLRB AUGUST REPORT, *supra* note 2, at 10.

80. See generally NLRB AUGUST REPORT, *supra* note 2; NLRB JANUARY REPORT, *supra* note 19; NLRB MAY REPORT, *supra* note 19.

81. See *infra* notes 83-130 and accompanying text.

tended to induce group action can be used as support for the substance prong of the analysis, or evidence of other coworkers' comments can be evidence of an employee's intention to induce group action. In the next Part, this Comment presents examples of cases from the Reports, as well as a few formal rulings from the NLRB that addressed the various factors of the current standard of evaluating social media communications.⁸²

1. *Whether Other Employees "Liked" or Commented on the Posting*

In an administrative law judge ruling in early 2012, *Three D, LLC*, the NLRB held that a coworker "liking" a Facebook status was enough to establish concerted activity.⁸³ In that case, an employee expressed frustration with his employer's tax practices on Facebook, and one of his coworkers "liked" the post.⁸⁴ The judge stated that concerted activity requires "a 'speaker and a listener,'" and found that the coworker's selection of the "'Like' option, in the context of the Facebook conversation, constituted concerted activity."⁸⁵ The judge stated that although the employee had communicated earlier with coworkers about the tax issues, the coworker's "like" was the dispositive factor in determining concerted activity.⁸⁶

2. *The Substance of the Post: Work Conditions, Wages, and Individual Gripes*

a. The "Scumbag" Boss

In one case (hereinafter *Scumbag*), an employee posted a status on Facebook calling her supervisor a "scumbag" because the employee requested that her supervisor provide a union representative for her, but the supervisor did not.⁸⁷ Some of her coworkers commented on her status with supportive remarks.⁸⁸ The employee was subsequently fired for the post.⁸⁹ The NLRB justified its decision to overturn the firing by reasoning that "the comments were made during an online

82. Because of the nature of the totality-of-the-circumstances test, the Reports do not clearly indicate which factor was decisive in determining whether the social media communication qualified as concerted. This Comment classifies the cases under different categories solely for the purpose of illustrating the various elements of the totality-of-the-circumstances test.

83. *Three D, LLC*, No. 34-CA-12915, at 8-9 (N.L.R.B. Jan. 13, 2012).

84. *Id.* at 3-4.

85. *Id.* at 9.

86. *Id.*

87. See generally NLRB AUGUST REPORT, *supra* note 2, at 5.

88. *Id.*

89. *Id.*

employee discussion of supervisory action, which is a protected activity."⁹⁰ The NLRB also commented that it was not bothered by the offensive nature of the employee's comment about her supervisor, noting that "the [NLRB] has found more egregious name-calling protected."⁹¹ The NLRB did not address how the substance of the comment qualified as concerted activity; the Report simply stated that because the discussion involved "supervisory activity," it was enough to satisfy the standard for concerted activity.⁹²

b. Irritating Coworker

In another case, an employee posted a complaint about her coworker's behavior on a social media outlet (hereinafter *Irritating Coworker*). The NLRB found that the employee's post did not qualify as concerted activity, even though it arguably related to the terms and conditions of employment.⁹³ The employee did not discuss her post with any of her coworkers and none of them responded to her post.⁹⁴ The NLRB decided that although the content of her post concerned the terms and conditions of employment, the more significant factor was that none of her coworkers responded to the post.⁹⁵ This case seems to indicate that the NLRB was more concerned about coworker participation in the online discussion than the substance of the post itself.

c. The "Tyranny" of Retail

The NLRB's August Report only mentioned a single case in which the NLRB found that even though multiple coworkers participated in the conversation, the Facebook communication did not constitute concerted activity because it was considered an individual gripe.⁹⁶ In that case (hereinafter *Tyranny*), the employee posted a Facebook status that complained about the "tyranny" at the store where he worked, as an expression of his annoyance about a supervisor who embarrassed him in front of the regional manager.⁹⁷ He also posted that his "[e]mployer would get a wakeup call because lots of employees are about to quit."⁹⁸ Although several of his coworkers commented on

90. *Id.* at 5–6.

91. *Id.* at 6.

92. *Id.* at 5.

93. NLRB JANUARY REPORT, *supra* note 19, at 32.

94. *Id.*

95. *See id.*

96. *Id.*

97. *See* NLRB AUGUST REPORT, *supra* note 2, at 17.

98. *Id.*

his page with supportive remarks, the NLRB found that the activity was not concerted.⁹⁹ Instead, “the employee’s Facebook postings were an expression of an individual gripe They contained no language suggesting that the employee sought to initiate or induce co-workers to engage in group action.”¹⁰⁰ The NLRB found that the employee’s post only expressed his individual frustration with his personal employment situation, which made it an “individual gripe.”¹⁰¹ This case seems to indicate that the NLRB uses an employee’s intent to induce group action as a factor in evaluating the difference between an individual gripe and concerted activity.

d. Coworker Conflict

In another case in the January Report (hereinafter *Coworker Conflict*), an employee was fired for posting “angry profane comments on her Facebook wall, ranting against coworkers and the [e]mployer, and indicating that she hated people at work, that they blamed everything on her.”¹⁰² Some of her coworkers commented on her post.¹⁰³ The General Counsel did not specifically classify the communication as an “individual gripe,” but the Report indicated that it was not protected because the comments “expressed her personal anger with coworkers . . . and did not involve the sharing of common concerns.”¹⁰⁴

3. *Intention to Induce Group Activity*

a. The Fired Bartender¹⁰⁵

Another case (hereinafter *Bartender*) involved a bartender who discussed the restaurant’s tipping policy on Facebook and was subsequently fired for it.¹⁰⁶ He had spoken with a fellow bartender about the policy at an earlier date, but “[h]e did not discuss his posting with any of his coworkers, and none of them responded to it.”¹⁰⁷ The NLRB conceded that the bartender’s post addressed the terms and conditions of his employment—a fundamental aspect of concerted activity.¹⁰⁸ Even though the substance of the post clearly dealt with terms and conditions of employment, the NLRB held that the other

99. *Id.*

100. *Id.*

101. *Id.*

102. NLRB JANUARY REPORT, *supra* note 19, at 11.

103. *Id.* at 12.

104. *Id.*

105. See generally *supra* notes 2–7 and accompanying text.

106. NLRB AUGUST REPORT, *supra* note 2, at 14.

107. *Id.*

108. *Id.*

factors of the concerted activity standard were not satisfied: the Report mentioned that the conversation did not grow out of an earlier conversation and the purpose did not appear to be the inducement of group action.¹⁰⁹ The Report mainly focused on the fact that none of the bartender's coworkers were actively engaged in the social media conversation because none of them commented on the post.¹¹⁰

b. *Hispanics United of Buffalo, Inc.*

While there are more than 100 social media cases pending before the NLRB, only four have led to a formal ruling on the issue of concerted activity in the context of social media, including *Hispanics United of Buffalo, Inc.*¹¹¹ In that case, an employee posted the following Facebook status: "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?"¹¹² Her coworkers responded with the following:

At 10:19, Damicela Rodriguez . . . posted the following response:

What the f . . . [sic] Try doing my job I have 5 programs

At 10:26, Ludimar (Ludahy) Rodriguez posted:

What the Hell, we don't have a life as is, What else can we do???

At 11: 11 [sic], Yaritza (M Ntal) Campos posted:

Tell her to come do mt [sic] fucking job n c if I don't do enough, this is just dum¹¹³

The conversation continued in a similar fashion and each employee who participated in the conversation was subsequently fired.¹¹⁴

This case was analyzed under precedent in which courts have held that action involving a speaker and a listener is concerted so long as it is engaged in with the object of initiating or inducing group action.¹¹⁵ Additionally, the NLRB stated that "[t]he objective of inducing group action need not be express."¹¹⁶ This statement indicates that the NLRB does not actually require that the employees try to change working conditions through their social media conversations: "[I]t does not depend on whether the employees herein had brought their concerns to management before they were fired, or that there is no

109. *Id.*

110. *Id.* at 14–15.

111. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 9 (N.L.R.B. Sept. 2, 2011). The NLRB affirmed the administrative law judge's decision in December 2012. *Hispanics United of Buffalo, Inc.*, No. 03-CA-027872 (N.L.R.B. Dec. 14, 2012).

112. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 4 (N.L.R.B. Sept. 2, 2011).

113. *Id.* at 5.

114. *See id.* at 4–6.

115. *E.g., Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Whittaker Corp.*, 289 N.L.R.B. 933, 933 (1988).

116. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 7 (N.L.R.B. Sept. 2, 2011).

express evidence that they intended to take further action, or that they were not attempting to change any of their working conditions.”¹¹⁷ Because the employee specifically engaged her coworkers in an online conversation, and coworkers joined the Facebook conversation, the NLRB found that their actions were a “concerted” group action.¹¹⁸ As the NLRB explained:

It stands to reason that if employees have a protected right to discuss wages and other terms and conditions of employment, an employer violates Section 8(a)(1) in disciplining or terminating employees for exercising this right—regardless of whether there is evidence that such discussions are engaged in with the object of initiating or inducing group action.¹¹⁹

c. Employer Appreciation

In the January Report, the NLRB provided more examples of social media activities that do not qualify as concerted. In one case, an employee posted on Facebook that her employer did not appreciate its employees (hereinafter *Employer Appreciation*).¹²⁰ “Although several of the [employee’s] friends and relatives commented on this . . . post, the four coworkers who were her Facebook ‘friends’ did not respond.”¹²¹ The NLRB found that the employee did not have a “particular audience” in mind when she made the Facebook posting.¹²² “[T]he post contained no language suggesting that she sought to initiate or induce coworkers to engage in group action, and the post did not grow out of a prior discussion about terms and conditions of employment with her coworkers.”¹²³ While the NLRB does not provide an example of what it means by “a particular audience,” the Report seems to indicate that choosing a particular audience means that the post contains some evidence of an intention to induce a response from a particular set of Facebook friends, such as “fellow coworkers how do u feel?”¹²⁴

4. *Growth out of Earlier Conversations/Concerted Activity*

In another formal ruling on concerted activity in the context of social media, *Karl Knauz Motors, Inc.*, a BMW salesman was upset at

117. *Id.* at 9.

118. *See id.*

119. *Id.* at 8.

120. NLRB JANUARY REPORT, *supra* note 19, at 6.

121. *Id.*

122. *Id.* at 7.

123. *Id.*

124. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 4 (N.L.R.B. Sept. 2, 2011).

the quality of refreshments served at a sales event.¹²⁵ He discussed the lackluster refreshments with his fellow salespeople because he was concerned that they could hurt the business and told them that he was going to take pictures and post them on Facebook.¹²⁶ After the event, the salesman posted pictures of the food, along with unflattering commentary, on Facebook and was later fired for his posts.¹²⁷ The NLRB held that the "lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity."¹²⁸ Noting that the employee had previously discussed the issue with his coworkers, the court found that it was concerted activity because (1) it was a logical outgrowth of concerted activity and (2) the lackluster refreshments could have had an effect on his compensation.¹²⁹ Interestingly, the NLRB found that it was concerted activity despite the fact that no other salespeople commented on the employee's Facebook posts because it considered the evidence of the logical outgrowth of concerted activity so compelling.¹³⁰

Although this Comment divided the various cases into separate categories for the purpose of illustrating the various points of the NLRB's totality-of-the-circumstances test, the Reports generally do not indicate which factors were dispositive in determining whether the social media communication qualified as concerted. Some of the cases could easily have illustrated multiple factors of the totality-of-the-circumstances test. This difficulty in classifying the cases demonstrates the need for a more straightforward test with clearly weighted factors.

Part III discusses how the NLRB's totality-of-the-circumstances test results in inconsistent and arbitrary rulings, which do not provide appropriate protection for employees' legitimate activities on social media outlets. To remedy this issue, this Comment proposes a new standard of review for social media communications, which focuses on the intent and substance of the post.

III. ANALYSIS

"The nation's labor laws need a status update."¹³¹

125. *Karl Knauz Motors, Inc.*, No. 13-CA-046452, at 7 (N.L.R.B. Sept. 28, 2012). The refreshments offered at the sales event included hot dogs from a cart, Doritos, and apples. *Id.*

126. *Id.*

127. *Id.* at 7–8, 10.

128. *Id.* at 10.

129. *Id.*

130. *Id.*

131. Dan Fastenberg, *Facebook Firings: Top 10 Cases and The NLRB's New Guidelines*, AOL Jobs (Sept. 2, 2011, 7:20 AM), <http://jobs.aol.com/articles/2011/09/02/facebook-firings-top-ten-cases-and-the-nlrbs-new-guidelines>.

Instead of applying an unwieldy, totality-of-the-circumstances test, the NLRB should focus on a two-part test, which should include: (1) the intent of the employee in posting the social media communication; and (2) the substance of the post. This Part discusses why the current NLRB standard does not adequately protect employees' concerted activities on social media sites.¹³² More specifically, argues that the NLRB's standard ignores the basic purpose of social media communications and, therefore, must be updated to include a more complete understanding of the nature of social media communications.¹³³

A. *The NLRB: Protector of Social Media Freedom?*

The NLRB Reports have been interpreted by legal commentators as advocating for broad protection of social media activities that discuss working conditions and terms of employment.¹³⁴ These protected social media communications include calling one's boss a scumbag,¹³⁵ posting pictures of a work event with biting comments,¹³⁶ and using colorful language to complain about a coworker.¹³⁷ News outlets have interpreted the NLRB's Reports as protecting employees in any situation in which an employee is addressing working conditions, from "simple complaints, to the exposure of unlawful activity."¹³⁸ Commentators have indicated that "the [NLRB] has a low threshold for what it considers to be 'concerted' activity."¹³⁹ In the wake of *Hispanics United*, one commentator even declared: "Note to disgruntled employees: You can't be fired for complaining about your job on Facebook."¹⁴⁰

132. See *infra* notes 143–88 and accompanying text.

133. See *infra* notes 143–88 and accompanying text.

134. See Dave Jamieson, *Facebook Posting Led to Unfair Firing: Feds*, HUFFINGTON POST (May 24, 2011, 4:15 PM), http://www.huffingtonpost.com/2011/05/24/facebook-posting-worker-fired_n_866353.html ("The case suggests, once again, that the labor board views Facebook and other social networking sites as a kind of open forum where employees should feel free to discuss working conditions without fear of being punished.").

135. See *supra* notes 87–92 and accompanying text.

136. See *supra* notes 125–30 and accompanying text.

137. See *supra* notes 111–19 and accompanying text.

138. Boris Segalis, *Top 11 Ways Social Media Policies #FAIL*, Fox Bus. (Sept. 22, 2011), <http://smallbusiness.foxbusiness.com/marketing-sales/2011/09/21/top-11-ways-social-media-policies-fail>; see also Ameet Sachdev, *Social Media Emerges as Battleground for Protected Speech at Work*, CHI. TRIB. (Sept. 2, 2011), http://articles.chicagotribune.com/2011-09-02/business/ct-biz-0902-chicago-law-20110902_1_social-media-labor-laws-employment-law.

139. Segalis, *supra* note 138, at 2.

140. Alison Frankel, *NLRB Judge: Employees Can Bitch About Their Jobs on Facebook*, THOMSONREUTERS (Sept. 12, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/09_-_September/NLRB_judge_Employees_can_bitch_about_their_jobs_on_Facebook.

Attorneys have also interpreted concerted activity broadly, noting that “[a] post only needs to discuss terms of employment to be protected.”¹⁴¹ Other attorneys have commented that the NLRB has appointed itself a “protector of social media freedom.”¹⁴² This Comment does not take the stance that an employee can never be fired for complaining about his or her job on social media, but rather argues that the NLRB must apply a more straightforward test to avoid arbitrary decisions on whether a social media communication constitutes a concerted activity.

The following Part discusses the various elements of the NLRB’s standard of evaluating social media and explains why the NLRB should both clarify and simplify its current totality-of-the-circumstances test in this context.

B. Issues with the NLRB’s Standard of Evaluating Social Media

This Part discusses why the other requirements of the NLRB’s current standard, such as the requirement of documentary evidence of coworkers’ “likes” and comments, should be exchanged for a simpler threshold question of whether the employee had coworkers who could access his social media communications.

1. Employee Comments on Social Media

“One potential problem with the question of whether activity is concerted may potentially lie, not with the employer’s conduct or even the employee’s conduct, but with the fortuitousness of whether coworkers choose to respond to the post in the first instance.”¹⁴³ The NLRB is doing employees a disservice by focusing on whether their coworkers actually posted on their profiles or tweets to draw the line between concerted and non-concerted activity.¹⁴⁴ In a recent administrative judge ruling, *Three D, LLC*, the court found that concerted activity was established by evidence that a single coworker “liked” the

141. See *id.* Regarding the decision in *Hispanics United of Buffalo, Inc.*, the same lawyer commented: “Unless [the decision] is overturned . . . Judge Amchan’s ruling offers broad protection to employees.” *Id.*

142. Cameron Shilling, *Social Media and the NLRB (Addendum): More Fuel for the Fire*, MCLANE PRIVACY & DATA SECURITY BLOG (Oct. 17, 2011), <http://blog.mclane.com/?p=866>.

143. Michael C. Schmidt, *Deciphering the NLRB’s Stance on Social Media Issues*, N.Y. L.J., Oct. 24, 2011, <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202519651886&slreturn=20120807174415>.

144. See generally *Facebook Posts: Protected Concerted Activity Under the NLRA?*, MICH. TELECOMM. & TECH. L. REV. BLOG (Jan. 30, 2011, 9:50 PM), <http://www.mttlrblog.org/2011/01/30/facebook-posts-protected-concerted-activity-under-the-nlra> [hereinafter MTTLR].

social media communication in question.¹⁴⁵ This factor of the NLRB's test is both overinclusive and underinclusive—the standard protects employees who have the random good fortune of receiving a “like” on their Facebook posts, while at the same time punishing employees whose coworkers may have read the posts but refrained from posting in the public forum.¹⁴⁶

In some cases, even when the NLRB found that the substance of the post involved terms or conditions of employment, the NLRB still found a lack of concerted activity. In *Irritating Coworker*, the NLRB found that the “comment could arguably relate to terms and conditions of employment because it pertained to her view that she was not respected on the job.”¹⁴⁷ Nevertheless, the NLRB found that even though the content of her post normally engenders concerted activity, there was no documentary evidence to establish concerted activity because none of her coworkers responded to her post.¹⁴⁸ Without documentary evidence of coworkers' comments on an employee's Facebook posts, the NLRB makes it extremely difficult for an employee to persuade the NLRB to overturn his firing.¹⁴⁹

While this Comment argues that the most compelling reason for simplifying the NLRB's current standard is to create more consistent rulings, the NLRB also needs to adequately protect employees' rights as conveyed by the NLRA. If the NLRB truly wants to protect the right of employees to communicate with other coworkers about terms and conditions of employment, then the NLRB must recognize the unique characteristics of social media communications.

2. Addressing the NLRB's “Particular Audience” Requirement

This Comment hopes to convince the NLRB to eliminate the element of documentary evidence in its totality-of-the-circumstances test, both as a way to clarify the NLRB's standard, as well as to protect the rights conveyed by the NLRA. However, the NLRB's requirement of a particular audience for the communication must be addressed.¹⁵⁰ In the *Employer Appreciation* case discussed above, the NLRB found that the employee who posted about a lack of employer appreciation

145. See *supra* notes 83–86 and accompanying text.

146. Ariana C. Green, Comment, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 867–70 (2012).

147. NLRB JANUARY REPORT, *supra* note 19, at 32.

148. *Id.*

149. The only exception is the salesman in *Knauz*. See *supra* notes 126–30 and accompanying text.

150. See *supra* notes 122–24 and accompanying text.

was not engaging in concerted activity because, although several of the employee's friends and relatives commented on her posts, "the four coworkers who were her Facebook 'friends' did not."¹⁵¹ The NLRB found that the employee did not have a "particular audience" in mind when she made the Facebook posting.¹⁵² However, the NLRB ignored the fact that when users post on Facebook, the information that they contribute to Facebook and Twitter is information that users actively decide to share with *all* their Facebook friends.¹⁵³ Thus, an employee who chooses to share with all of her friends has included her coworkers in the target audience.¹⁵⁴

Employer Appreciation mentioned no evidence that the user prevented her coworkers from seeing her posts.¹⁵⁵ The employee had posted about work in the past, and her coworkers had commented on her posts, so the employee would have been aware that her coworkers were part of her Facebook audience.¹⁵⁶ Therefore, there is no reason to assume that the employee did not want her coworkers to read her posting. Yet, the decision suggests a requirement that the employee must have targeted her coworkers.

If for example, employees do not choose a particular audience for their Facebook posts, but simply share it with all their friends, the "audience" analysis becomes even murkier. In a case decided before the advent of social media, *Whittaker Corp.*, the NLRB found that concerted activity requires the presence of only a "speaker and a listener."¹⁵⁷ In a face-to-face communication, defining a speaker and listener is fairly straightforward. However, in social media communications 90% of users passively observe social media, while only 10% contribute content.¹⁵⁸ Therefore, while it may be easy for a court to identify the speaker, it is much more difficult to identify the listener, especially when the employee has not specified a particular audience with which to share his social media communications.

The Reports do not account for the difference between listeners who are communicating in person versus through social media be-

151. NLRB JANUARY REPORT, *supra* note 19, at 6.

152. *Id.* at 7.

153. Users are encouraged to use an "audience selector" to choose who may view their posts. See *Choose Who You Share With*, FACEBOOK, <http://www.facebook.com/help/459934584025324> (last visited Jan. 14, 2013) (follow "when I share something, how do I choose who can see it" hyperlink).

154. See *id.*

155. See NLRB JANUARY REPORT, *supra* note 19, at 6-7.

156. *Id.* at 6.

157. *Whittaker Corp.*, 289 N.L.R.B. 933, 933 (1988).

158. HANSEN ET AL., *supra* note 54, at 129.

cause Mr. Solomon seems intent on applying the same set of rules to communications that occur in the office or Facebook. "Solomon said federal law permitted employees to talk with coworkers about their jobs and working conditions without reprisal—whether that conversation takes place around the water cooler or on Facebook or Twitter."¹⁵⁹ However, a conversation that happens around the water cooler is likely to be different from one that occurs on Facebook because listeners are identified differently. In a face-to-face situation, for example, even if a listener said nothing at the water cooler, but merely passively listened to a conversation about working conditions and wages, the NLRB would likely find that the activity was concerted. However, if an employee posts a Facebook status about working conditions and wages, it is much more difficult to determine who is listening, and without clear-cut documentary evidence in the form of coworkers' comments or likes, the NLRB will likely find that the activity was not concerted.

As a solution to the NLRB's concerns about a particular audience for the social media communication this Comment proposes a fairly simple question: Did the employee have coworkers who could access his social media posts? If the answer is no, the analysis ends there and the employee's termination will be upheld. If the answer is yes, then the NLRB need not spend time analyzing whether the employees' coworkers "liked," commented on, or otherwise served as a particular audience for the social media communication because the audience is built-in with the social media communication. Using this simplified threshold analysis, the NLRB can move on to the revised two-factor test to review social media communications.

C. *The New Test*

This Comment proposes a new test for evaluating social media communications, which focuses on intent and substance. This Part discusses the first factor of the test: the employee's intent to initiate discussion with coworkers. This Part explains that while an employee who expresses the direct intent to engage his coworkers in a dialogue about protected topics is an easy situation, this factor can still be easily satisfied without providing proof that the employee desired to induce group action. Additionally, this Part describes how the lurking phenomenon provides support for satisfaction of the intent element.

159. Sam Hananel, *To Post or Not to Post? Employers, Workers, Struggle over Facebook*, MSNBC (Sept. 26, 2011, 4:45 AM), http://www.msnbc.msn.com/id/44666868/ns/technology_and_science-tech_and_gadgets/t/post-or-not-post-employers-workers-struggle-over-facebook.

1. Intent to Initiate Employee Discussions

a. No Need for Explicit Intention to Induce Group Action

According to the NLRB's ruling in *Hispanics United*, the fact that the employee's social media communication did not induce his co-workers to take action does not affect the NLRB's protection of the employee's concerted activity.¹⁶⁰ In that case, the NLRB made it clear that to qualify as concerted activity, an employee's communication need only demonstrate the intent to engage with other employees:

[T]he activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action . . .¹⁶¹

The NLRB found that the question asked by the employee in the post—"[my] fellow coworkers how do u feel?"¹⁶²—was an explicit intention to engage in a conversation about work conditions. However, the NLRB went even further, stating, "The object of inducing group action need not be express."¹⁶³ By creating a Facebook post that relates to working conditions, terms of employment, or wages, an employee most likely wants his Facebook friends to read the post and comment—the intention of receiving feedback from coworkers is implicit in the action of posting on Facebook. However, Facebook users cannot control whether their friends will comply with their desire for a reaction by commenting or "liking" their posts:

As any Facebook user knows, one has little control over whether another user will respond to or comment on a Facebook post. Can the modern definition of concerted activity under the NLRA and its resulting protections really hinge on the arbitrary and random impulses of others to respond to a Facebook post? After all, how is a Facebook post criticizing a supervisor to which no one actually responds but which some people may privately express approval of significantly different than an employee making the same statement to a group of employees who may nod in agreement in a hallway at the office?¹⁶⁴

Thus, while a coworker's response may evidence the intent to engage coworkers, the lack of a response should not be conclusive evidence that there was no intent to engage coworkers. As discussed

160. See *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 8 (N.L.R.B. Sept. 2, 2011).

161. *Id.* at 7 (citations omitted).

162. *Id.* at 4.

163. *Id.*

164. MTTLR, *supra* note 144.

earlier, Facebook users might have many reasons for not responding to a post. These reasons include concerns about employer retribution or discomfort with the idea of responding in a public forum.¹⁶⁵ These same concerns would not necessarily apply if the conversation happened around the water cooler because the employee does not create documentary evidence of his dissent.

b. Implicit Intention to Engage Coworkers in Social Media

As Jonathan Hyman, a Cleveland labor and employment attorney, said: "When you start looking at individual conduct versus concerted activity, social media really blurs the line."¹⁶⁶ "People don't post on Facebook or Tweet or blog to have conversations with themselves. They're doing it to engage with other people."¹⁶⁷

Social media differs from face-to-face communications because social media users tend to share information differently on Facebook and Twitter than they would in a workplace environment.¹⁶⁸ The impetus for starting a conversation on Facebook is different than a face-to-face conversation: if an employee in the company cafeteria grouches that his supervisor is a "scumbag," he might just be blowing off steam, without necessarily wanting to start a whole conversation. However, social media communications require more forethought than in-person conversations—a user must get to a computer or mobile device, log onto Facebook, and type out the user's thoughts before clicking "post." Therefore, the employee who calls his supervisor a "scumbag"¹⁶⁹ on Facebook is most likely looking for a response; the intention to engage others in a discussion is implicit in the act of posting a status on Facebook.¹⁷⁰ Otherwise, people would just write their thoughts in a journal or complain about their boss to their spouse at home.

c. The Lurking Phenomenon, Revisited

While 90% of users do not actively participate in social media, they do read their friend's posts and comments—a phenomenon known as

165. Crabb, *supra* note 53.

166. See Pledger, *supra* note 53.

167. *Id.*

168. See *supra* notes 44–46 and accompanying text.

169. NLRB AUGUST REPORT, *supra* note 2, at 5.

170. See Molly Wood, *How Facebook Is Ruining Sharing*, CNET NEWS (Nov. 18, 2011, 10:57 AM), http://news.cnet.com/8301-31322_3-57324406-256/how-facebook-is-ruining-sharing ("Sharing is the key to social networking. It's the underlying religion that makes the whole thing work.").

"lurking."¹⁷¹ There are many reasons for "lurking," but for the purposes of this Comment one reason stands out: some social media users simply do not want to speak on a public platform.¹⁷² Some employees may prefer to keep their opinions about their employers to themselves, but they are still very interested in what their coworkers have to say about work conditions and terms of employment. Assume an employee is Facebook friends with his coworkers. If he posts a work-related complaint, his coworkers will likely see the post. His coworkers may be too wary of employer reprisal to actually comment on the posts, but they likely still benefit from reading their coworkers' thoughts and complaints.¹⁷³ It could also induce these employees to take action if they see that their coworkers have the same feelings. If employees see that their feelings about a supervisor's actions or work conditions are shared by a coworker on Facebook, it might empower that coworker to engage in a discussion about the issue in the post—whether on social media, in person with that coworker, or with others at work.

As social media communicators express their feelings on Facebook and Twitter to engage with others and the lurking phenomenon explains that coworkers may be affected by those posts, the intent to engage in a discussion with coworkers should be implied in a social media communication. Because the NLRB has stated that the "object of group action need not be express"¹⁷⁴ the intent factor of the test should be satisfied with the act of posting the social media communication.

2. *Substance of the Post*

The more significant and difficult factor of the standard proposed in this Comment is whether the substance of the post qualifies as global employment concern. The next Part discusses how the NLRB should evaluate the substance of the post. The substance factor can be evaluated by looking at a variety of issues, including: (1) whether it was a logical outgrowth of prior concerted activity; and (2) whether the post addressed "global" working conditions and wages, rather than an individual gripe.

171. See *supra* notes 44–62 and accompanying text.

172. Crabb, *supra* note 53.

173. HANSEN ET AL., *supra* note 54, at 129.

174. See *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 4 (N.L.R.B. Sept. 2, 2011).

a. Logical Outgrowth of Prior Concerted Activity

Although in its formal ruling, *Karl Knauz*, the NLRB did not require documentary evidence of coworkers responding to the salesman's Facebook post, it seemed to make an exception because the salesman told his coworkers that he was going to post on Facebook, and it was clearly a logical outgrowth of the earlier conversation.¹⁷⁵ Therefore, this case suggests that when prior concerted activity occurred before the social media communication, the NLRB can decide that the subsequent social media communication should be considered a logical outgrowth of prior concerted activity.

b. Individual Gripes and Collective Discourse: The *Tyranny* of Retail and Tension with *Scumbag*

While the NLRB's protection of social media communications appears broad, the NLRB has attempted to place some limitation on its protection of employees' social media activities. To this end, the NLRB attempted to distinguish between individual gripes and collective discourse in its August Report.¹⁷⁶ The NLRB's General Counsel, Lafe Solomon, warned workers that not everything they write on Facebook or Twitter will be permissible under the law just because it discusses their job.¹⁷⁷ Solomon stated: "A lot of Facebook, by its very nature, starts out as mere griping We need some evidence either before, during or after that you are looking to your fellow employees to engage in some sort of group action."¹⁷⁸

The NLRB's August Report mentions one case in which the NLRB attempted to distinguish between an individual gripe and concerted activity.¹⁷⁹ In *Tyranny*, the NLRB held that although the employee's comments about the "tyranny" created by his supervisor related to work conditions and the Facebook posts were commented on by his coworkers, "[t]hey contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action."¹⁸⁰ In *Scumbag*, the NLRB justified its decision to overturn the

175. See *supra* notes 125-30 and accompanying text.

176. See NLRB AUGUST REPORT, *supra* note 2, at 17 (noting that an expression of frustration with a manager over an individual dispute constitutes an individual gripe, not concerted activity). "In the broadest terms, employees have long been protected from employer retaliation when engaging in a 'concerted activity' to improve their working conditions. In deciding what to protect, the NLRB will continue to look for action deemed to be constructive, as opposed to an individual gripe." Fastenberg, *supra* note 131.

177. Hananel, *supra* note 159.

178. *Id.* (internal quotation marks omitted).

179. See NLRB AUGUST REPORT, *supra* note 2, at 17.

180. *Id.*

firing of an employee who called her supervisor a "scumbag" because the comments were made during an online discussion of her supervisor's actions.¹⁸¹

The distinction between *Tyranny* and *Scumbag* is difficult to discern from the August Report's terse description.¹⁸² In *Scumbag*, the NLRB stated that "[a]s to the subject matter of the discussion, the comments were made during an online employee discussion of supervisory actions, which is protected activity."¹⁸³ That description seems equally applicable to *Tyranny*, in which the employee complained about the "tyranny" of his supervisor and received comments from his coworkers on his Facebook page.¹⁸⁴ It appears in these cases the NLRB made a judgment call about the substance of the communication rooted in the underlying complaints: in *Scumbag*, the employee complained about being denied a union representative,¹⁸⁵ and in *Tyranny*, the employee complained about being personally reprimanded in front of the regional manager.¹⁸⁶ Because both cases dealt with an online discussion of work conditions, it appears that factor of concerted activity was satisfied. Unfortunately, the decisions fail to provide adequate guidance as to why concerted activity was found in one case and not the other.

In *Coworker Conflict*, the NLRB would not protect an employee's social media communication because it "expressed her personal anger with coworkers . . . and did not involve the sharing of common concerns."¹⁸⁷ The Report provides little guidance on what makes this communication different from others, but it appears that, once again, Mr. Solomon decided that the individual's post expressed only her personal frustration and did not address any global employment concerns.

The NLRB must provide a clear indication of what distinguishes an individual gripe from legitimate concerted activity. This trio of cases indicates the ways in which the NLRB's totality-of-the-circumstances test can result in arbitrary and conflicting decisions. If instead, the analysis moved away from the requirement of coworker commentary, and the NLRB framed the discussion differently, suggesting that in one case there was a global employment issue (union representation that needed to be addressed) while in the other it was just an individ-

181. *Id.* at 5.

182. *Compare id.* at 5–6, *with id.* at 17–18.

183. *Id.* at 6.

184. *Id.* at 17–18.

185. NLRB AUGUST REPORT, *supra* note 2, at 5–6.

186. *Id.* at 17–18.

187. NLRB JANUARY REPORT, *supra* note 19, at 12.

ual frustration over an embarrassing work moment, it would be easier to distinguish concerted activity from individual gripes in future cases.

The NLRB should focus more on the substance of the post because such a test would result in fewer inconsistent decisions, as well as better protect the rights conveyed by the NLRA to the employees engaging in concerted activities. Most significantly, the NLRB's current standard fails to provide clear guidance to employers on what constitutes an individual gripe, which this Comment considers the most important distinction in the context of concerted activities on social media outlets. This distinction needs to be clearly explained by the NLRB when it reviews social media communications, which is why, in evaluating social media activity, the revised test proposed by this Comment places the most weight on the substance of the post. This revised test will force the NLRB to provide direction on the differences between individual gripes and concerted activity.

The criteria under this revised test would differ from the current NLRB standard by moving the focus from the evidence of coworkers' commentary to the substance of the post. The new analysis would involve the following steps. First, the threshold question must be quickly addressed: did the employee have coworkers as Facebook friends or Twitter followers who could access his comments. Once that threshold question is satisfied, the NLRB should move on to the two-part test. First the NLRB should focus on the employee's intent with the social media communication—if for example, the employee evidenced an intention to involve his or her coworkers in the conversation, such as by directly addressing them in a post, that factor of the test should be satisfied. Second, if the post addresses an employee's working conditions, wages, or terms of employment, it should qualify as concerted activity, unless it was only an expression of personal frustration.¹⁸⁸ If an employee can provide evidence to satisfy these elements, then the employee's social media communication should be protected.

IV. IMPACT

"You are what you tweet."¹⁸⁹

One of the problems with the current NLRB standard is the difficulty in applying case law decided before the advent of social media to

188. *Compare Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 8, with NLRB JANUARY REPORT, *supra* note 19, at 12.

189. Shane Barker, *15 Great Social Media Quotes*, PERSONAL BLOG OF SHANE BARKER (Jan. 25, 2012), <http://shanebarker.com/15-great-social-media-quotes> (internal quotation marks omitted).

the modern digital world.¹⁹⁰ Legal experts interpreted the August Report to indicate that "the NLRB is basically taking well-established workplace rules and applying them to a different form of communication."¹⁹¹ However, social media has substantially changed the way people communicate, and the law has not kept up.¹⁹² If the NLRB insists on evaluating and deciding social media cases using existing legal principles, then it must account for the difference between interactions taking place in person and those occurring in social media forums.¹⁹³

The standard of review proposed in this Comment would undoubtedly make some employers unhappy because it would likely be easier for employees to prove that their social media posts should be considered concerted activity. For example, if an employee were to write a message on Twitter such as "my boss is a jerk for making me work so late," and was terminated for that post, the NLRB would have to apply the multi-factor test described in this Comment. First, the NLRB should ask, as a threshold question, whether the employee's coworkers could access the employee's post. If so, the NLRB would look at the following two factors: (1) whether the employee intended to initiate discussion among coworkers; and (2) whether the substance of the post qualified as a global employment concern.

This type of analysis would require the NLRB to take a deeper look at the substance of the communication, moving the NLRB's focus away from whether the employee's coworkers responded to the post. The NLRB would have to focus on whether the personal frustration could possibly have a global effect on other employees, or whether it would *only* apply to the employee in question. An example of a clearly individual gripe could be an employee whose boss reprimanded him for coming to work two hours late every day for a week when company policy requires employees to be present in the office for forty hours a week. The employee writes a post that refers to his

190. See Scott Faust, *Rhyme or Reason? Trying to Make Sense of the NLRB's Social Media Cases*, PROSKAUER (Oct. 12, 2011), <http://www.laborrelationsupdate.com/nlr/rhyme-or-reason-trying-to-make-sense-of-the-nlrbs-social-media-cases> ("There has been no indication that existing rules will be modified or adapted to meet the realities of the digital world, despite fundamental differences in the character of on-line communications versus more traditional forms of employee communication. Though the rules may be familiar, applying them to social media cases is a challenge.").

191. Sachdev, *supra* note 138.

192. See Danielle Levine, Note, *Facebook and Social Networks: The Government's Newest Playground for Information and the Laws that Haven't Quite Kept Pace*, 33 HASTINGS COMM. & ENT. L.J. 481, 483 (2011).

193. See Faust, *supra* note 190.

supervisor as a “Watch Nazi,” and ten of the employee’s co-workers can access his social media communications.

The NLRB’s threshold question of coworker access to the social media communication would be satisfied by the evidence of coworkers who could access the post. Next, the NLRB would have to evaluate the intent and substance of the post. In this case, although the employee would likely satisfy the intent factor, the substance factor would likely not be satisfied. The employee’s complaint was an individual one—it referred only to a personal problem that he had with his supervisor, who reprimanded him for flagrant tardiness. This complaint did not address any global employment issues, which might apply to other employees. However, if the facts were slightly different, such as if the employee had been verbally berated by the supervisor for his tardiness, and the supervisor had a pattern of berating his employees for breaking company rules, then the employee would have a stronger case for arguing that his Facebook post addressed global working conditions.

Employers might argue that it is too difficult to examine the substance of a social media post and that it is easier to just use the implicit rule delineated by the NLRB: “[T]he key isn’t so much what people say as why they say it.”¹⁹⁴ However, that rule is much more difficult to apply fairly in the social media world because the purpose of social media communication is to engage others. If an employee posts a comment about a supervisor on Facebook, he likely wants his Facebook friends to respond. The NLRB must ask if an employee was just whining to his Facebook friends in general, or if the employee was communicating a legitimate global employment concern to coworkers who could access his communication.

Because the NLRB focuses too heavily on whether employee’s coworkers commented on the post, rather than on the substance of the post, its current standard of review does not provide the broad scope of protections intended by the NLRA. The NLRB’s standard of review should acknowledge the phenomenon of lurking, as social media does not require actual participation by the “listener” to create a conversation. By acknowledging the fact that people post on social media sites to engage with others, the revised standard would allow the NLRB to protect a broader range of employee social media communications, thereby satisfying the protections provided by the NLRA. It

194. See Wendy Davis, *A Tangled Web*, N.Y. POST (Oct. 30, 2011, 10:20 PM), http://www.nypost.com/p/news/business/jobs/tangled_web_RulSgHWpa7WlpU0PUzVa1N#ixzz1dv3VyiPR. According to Cynthia Estlund, a NYU Law Professor who specializes in labor law, “If you’re just mouthing off to the ether, it might not qualify as concerted activity.” *Id.*

would also ensure that employees who are merely using social media to complain about employers for purely personal issues will not be able to overturn their terminations.

Once this standard has been implemented by the NLRA, employers may update or totally revamp their social media policies because there will be a more consistent and coherent standard to follow. In the Reports, the General Counsel emphasized the following: "[E]mployers must define broad terms or give examples of what circumstances are prohibited to remove any ambiguity that could chill employees' protected activity."¹⁹⁵ If the employers do not clarify the limits of "broad terms," the NLRB will likely find the policies to be overbroad, and thus in violation of the NLRA.¹⁹⁶ As the NLRB's current parameters on the difference between individual gripes and concerted activities are confusing, employers do not have sufficient guidance on how to provide examples of legitimate concerted activities versus individual gripes. Therefore, employers should indicate that social media communications that deal with global employment concerns, such as the necessity of union representation, will likely be protected,¹⁹⁷ while social media communications that do not address working conditions or wages, such as an employee's personal frustration with a manager, will not be protected.¹⁹⁸

V. CONCLUSION

Lafe E. Solomon, the NLRB's General Counsel, stated that he wrote the August Report hoping that it would be "of assistance to practitioners and human resource professionals."¹⁹⁹ However, by providing murky guidance and not taking the true nature of social media into account, the Reports fail to achieve the General Counsel's goals. The NLRB's current standard of review does not adequately address the differences between social media communications and in-person conversations. Is it fair to hold an employee who posts a Facebook status to a higher standard than if the employee makes the same statement in the workplace? If the same employee had a conversation in the hallway about his supervisor and his coworkers listened to the conversation, the NLRB would likely find that the conversation was concerted. As the legal principles of the twentieth century are being

195. Edward G. Phillips, *Advising Clients on the NLRB's Treatment of Social Media Cases*, TENN. B.J., Oct. 2011, at 30, 32.

196. *See id.*

197. *See supra* notes 87–92 and accompanying text.

198. *See supra* notes 102–04 and accompanying text.

199. NLRB AUGUST REPORT, *supra* note 2, at 2.

applied to these new social media situations in the twenty-first century, it seems unjust that an employee who attempts to engage his coworkers in an online conversation would be punished simply because none of them responded—the listener is still present, provided coworkers could access the post.

To better distinguish concerted activity from non-concerted activity, the NLRB must acknowledge the distinct nature of social media communication. The overwhelming majority of social media users do not contribute content on social networking sites. Therefore, the NLRB cannot apply a standard that relies heavily on evidence of coworker participation because such a standard does not adequately reflect whether social media users were part of the conversation. To provide adequate protection of employees' rights to engage in concerted activity on social media sites, the NLRB must update its standard to include a more complete understanding of the true nature of social media communications. Additionally, the test for social media communications must clearly delineate the difference between individual gripes and concerted topics because employers need guidance on how to spot the difference before the employee is terminated in the first place.

The standard described in this Comment will allow employers to protect themselves from slander and harassment without infringing on their employees' rights because only posts that deal with legitimate concerted topics will be protected. By providing examples of the difference between individual gripes and concerted activities, employer social media policies can protect employees' rights to engage in concerted activities on social media, while also encouraging employees to *think* before they post. Despite the protections available under the NLRB for concerted activity, employees would still be well-served to consider a single factor before posting anything on social media: "don't say anything online that you wouldn't want plastered on a billboard with your face on it."²⁰⁰

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200. Jenna Wortham, *A Pair of Social Media Predicaments*, N.Y. TIMES (Nov. 23, 2009), <http://gadgetwise.blogs.nytimes.com/2009/11/23/a-pair-of-social-media-predicaments>.

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